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(2)

No. 05-1076

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN Y. PADOT,

Petitioner

v.

BRENDA G. PADOT,

Respondent

On Petition for A Writ of Certiorari
To The Second District Court of Appeals of Florida

BRIEF IN OPPOSITION

JANE HARLEY GROSSMAN
Counsel of Record
132 24th Avenue North
St. Petersburg, Florida 33704
Phone (727) 823-7600
Counsel for Respondent

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QUESTION PRESENTED FOR REVIEW

Where a veteran has elected to take military disability pay in lieu of retired pay, may state courts, in contravention of federal statutes, 10 U.S.C. 1408 and 38 U.S.C. 5301, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989), nonetheless require former service members to remit to former spouses a part of that foregone pay, even without an indemnification provision in the divorce property settlement?

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INTRODUCTION

The issue in this case is whether the Uniformed Services Former Souses Protection Act (hereafter USFSPA) as interpreted by this Court in *Mansell v. Mansell*, 490 U.S. 581, 109 (1989) pre-empts or in any way restricts state courts from enforcing a divorce decree as it relates to a former military members *post-judgment* conversion of retirement benefits to veterans' disability pay, when a portion of those retirement benefits were previously allocated to the non-military spouse in the property distribution. There has been no pre-emption of federal law in the instant case , as the waiver of retirement benefits in lieu of disability pay occurred post-judgment. Further, the Florida Circuit Court very specifically, in respect of *Mansell,* clarified that Mr. Padot is not required to utilize any of his veterans' disability pay to satisfy his obligation to Mrs. Padot.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement (of the Case and Facts) as accurate but supplements it with the following:

1. The Supplemental Order of 1995 divided Mr. Padot's military retirement benefits and provided a specific formula to be utilized in calculating the exact percentage to be awarded Mrs. Padot upon his retirement from military service. (Petitioner's App. pp. 16a - 20a). The Supplemental Order also provided that the court would have continuing jurisdiction "to enforce the former spouse's rights to her share of the [retirement] benefits." (Petitioner's App. p. 8a).

2. In April 2001, after Mr. Padot retired from the military and converted a portion of the military retirement benefits to veterans' disability benefits, he became employed as a civilian air traffic controller working for the United States government. (Petitioner's App. pp. 16a - 17a).

3. In its Order Re: Military Retirement, the Florida Circuit Court found:

> "Further review of Judge Costello's March 17, 1995 Supplemental judgment indicates a denial of alimony to the former wife. Reasonable interpretation of the Supplemental Judgment as a whole could lead a reasonable reviewer to the conclusion that the former wife's share of the military retirement would stand in the place of alimony. Such appeared to be the overall plan set forth in the Supplemental Final Judgment. That plan seems to have been altered

> by the voluntary action of the former husband which actions seems contrary to the provision of Paragraph (11) of the Supplemental Judgment. (Petitioner's App. p. 18a).

4. Paragraph (11), referenced by the trial court, provided:

> " . . . (11) Reduction in Value: Neither party
>
> shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit . . ." (Petitioner's App. p. 17a).

5. The Florida Circuit Court, noting that Mr. Padot was working as a civilian air traffic controller, in addition to receiving military retirement benefits and veterans disability pay, found:

> The net result that the parties find themselves in today is that the former husband is retired from the military and drawing more from his military service than he would have absent the disability pay. The disability pay carried the advantage of being non-taxable and therefore a dollar for dollar transfer from regular retirement pay to disability inures to the definite benefit of the retired military member/the former husband. Further, by federal law, the former husband has further increased the benefit of transferring funds from regular retirement to disability by seeking to shield those funds from the former

wife's share as established in the Final Judgment. The net result is a substantial increase derived by the former military member at the expense of his former wife.

> Were the facts to end there then perhaps the inequitable nature of the result would be set in place, however, the former husband who has been retired with disability as an air traffic controller from active military duty is now doing the same work as an air traffic controller at the hire of the U.S. Government in the capacity of a civilian. The pay from the now civilian air traffic controller both inures to his benefit and also provides funds that are not a part of his disability payment which funds are available to supplement the former wife's loss as a result of the former husband's voluntary reduction in retirement pay in favor of disability pay. (Petitioner's App. pp. 18a - 19a)

6. The Florida Circuit Court clarified that:

> Nothing in this Order should be read to require the former husband to pay any portion of his disability retirement income from his active military duty time over to the former wife. The Court orders no portion of that pool of funds in whatever amount that pool may be from time to time to be payable over to the former wife. (Petitioner's App. p. 19a).

Mr. Padot appealed the Florida Circuit Court Order to the Second District Court of Appeal of Florida which rendered

its Opinion on December 15, 2004. (Petitioner's Appendix pp. 1a - 14a). The Florida Appellate Court noted its review of the law of *Mansell*, correctly concluding, however, that *Mansell* did not control, given the factual distinctions of the instant case (Petitioner's App. p. 9a).

REASONS FOR DENYING THE PETITION

NEITHER THE USFSPA NOR *MANSELL V. MANSELL* RESTRICT THE AUTHORITY OF STATE COURTS TO GRANT EQUITABLE ENFORCEMENT RELIEF WHEN A FORMER MILITARY MEMBER UNILATERALLYCONVERTS, *POST JUDGMENT*, RETIREMENT BENEFITS TO VETERANS' DISABILITY PAY, INCLUDING THE PORTION OF THE BENEFITS PREVIOUSLY AWARDED TO THE FORMER SPOUSE IN A DIVORCE DECREE.

The decision of the Florida Circuit Court, as affirmed by the Florida Appellate Court, Second District of Florida, does not violate the Supremacy Clause of the United States Constitution. The decision does not impermissibly contravene the USFSPA, as interpreted by this Court in *Mansell*. The decision, in fact, is very respectful of the applicable federal law.

Mansell does not apply to State courts' enforcement of divorce decrees which divide military retirement benefits, when those benefits are converted, *post-judgment*, to veterans' disability payments. The Florida Circuit Court Order does not violate the anti-attachment provision of 38 U.S.C. § 5301, as it specifically clarifies that it was not requiring Mr. Padot to use any portion of his disability pay to satisfy his obligation to Mrs. Padot.

This Court has recognized the long standing general rule that "[T]he whole subject of the domestic relations of husband and wife,

parent and child, belongs to the laws of the States and not to the laws of the United States." *Boggs v. Boggs*, 520 U.S. 833 (1997), citing *In re Burrus*, 136 U.S. 586, 593-598 (1890). In *Rose v. Rose*, 481 US. 619 (1987), this Court reiterated, "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination of whether Congress has 'positively required by direct enactment' that State law be pre-empted." (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). This Court further recognized, "Before a state law governing domestic relations will be overridden, it "must do 'major damage' to clear and substantial federal interests." Id. at 625.

The USFSPA clearly authorizes state courts to treat "disposable retired or retainer pay" as marital property. 10 U.S.C. § 1408(c)(1)(2003). Disposable retired or retainer pay does not include amounts waived to receive disability benefits. 10 U.S.C. § 1408(a)(4)(B)(2003). Congress has provided specific language as to what constitutes "disposable retired or retainer pay" and grants authority of the state courts to treat the pay as marital property, but there is no "positive requirement by direct enactment" which restricts state courts in any way from granting equitable relief to a former non-military spouse when the retired pay is converted, post-judgment, and the conversion deprives the former non-military spouse of a vested property interest.

The applicable language of *Mansell* provides; "[T]he Former Spouses' Protection Act does not grant state courts the power to treat as property *divisible upon divorce* military retirement pay that has been waived to receive veterans' disability benefits." (Emphasis added) 490 U.S. at 593. Many state courts have interpreted the plain language of this holding to restrict division of disability benefits

which exist only as of the date of the divorce and that state courts have the authority to enforce a former non-military spouse's entitlement to retirement benefits awarded and thereby vested in the divorce. See e.g. *Black v. Black*, 842 A.2d 1280 (Me. 2004) "Because *Mansell* explicitly addressed the USFSPA as precluding a state divorce court from treating military retirement pay that had previously been converted to disability pay 'as property division *upon divorce*,' we agree with those jurisdictions that conclude that the USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property." (Emphasis in the original)

The equitable principle applied by the state courts is that a former military member's unilateral conversion of benefits previously awarded to a former non-military spouse is an impermissible modification of a vested property interest. See *Warkocz v. Warkocz*, 2006 WL 871162 (Colo. App.) "[T]he dissolution decree gave the wife a vested interest in the husband's military retirement benefit which interest was entitled to enforcement . . ."; *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (Nev. 2003) "Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved."); *Gurtz v. Gurtz*, 186 S.W.3d 435 (Mo. Ct. App. 2006), "Once it has been divided as part of a final decree, a pension may not be redivided after circumstances have changed."; *Knapf v. Knapf*, 55 Mass. App. Ct. 485, 771 N.E.2d 819 (Mass. App. Ct. 2002), aff'd 786 N.E.2d 819 (Mass. 2003) "[W]e conclude that the judge's order did not constitute a division of veterans' disability payments, but rather gave

meaning to the plaintiff's rights under the contract by directing payment that gave her the economic value of her promised equal share of the defendant's military retirement pay."; *Black v. Black*, 842 A.2d at 1285, "[W]e agree with those jurisdictions that conclude that the USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property."; In re the Marriage of *Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct.App. 1998), "[We] decline to require court to disturb property allocation in final divorce decrees when a former spouse/military retiree obtains civil service employment after the decree has been entered." See also *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996); *Hillyer v. Hillyer*, 59 S.W.3d 118 (Tenn. Ct. App. 2001); *and Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). These courts have found that there is no pre-emption of federal law in their grant of post-judgment enforcement relief to a former non-military spouse whose retirement benefits were unilaterally converted to disability benefits subsequent to the divorce.

The Florida Circuit Court and the Florida Appellate Court both found that the relief awarded Mrs. Padot did not violate *Mansell*. The Florida Appellate Court distinguished the instant case from *Mansell* in that here, Mr. Padot was still in the military at the time of the divorce. His waiver of retirement benefits in lieu of disability benefits occurred post-judgment. After his waiver he obtained employment and had income other than his disability pay with which to satisfy the property award to Mrs. Padot. In *Mansell* this court addressed the application of the USFSPA to a pre-judgment waiver of retirement pay in lieu of disability pay. 490 U.S. 581, 585-586. Also distinguishing the instant case from *Mansell* is

the fact the Florida Circuit Court specifically ruled that it was not ordering Mr. Padot to utilize his disability pay to comply with the divorce decree.

Justice O'Connor, writing for the dissent In *Mansell*, recognized the potential loss to a former non-military spouse if the military spouse is permitted to unilaterally convert retirement benefits, including those distributed as property to the non-military spouse, to veterans' disability pay. 490 U.S. at 595. Justice O'Connor noted that "The harsh reality of this holding is that former spouses like Gail Mansell can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits." Id. Justice O'Connor further states:

> The Former Spouse's Protection Act does not "positively require" States to abandon their own law concerning the divisibility upon divorce of military retirement pay waived in order to obtain veterans' disability benefits. On the contrary, the whole thrust of the Act was to restore to the States their traditional authority in the area of domestic relations. 490 U.S. at 597.

Contrary to the Petitioner's assertion, there has been no implication of the anti-attachment provision of the USFSPA in the enforcement relief afforded Mrs. Padot by the Florida Circuit Court. The applicable provision of the anti-attachment provision, codified at 38 U.S.C. 5301(a) (1), provides:

> Payments of benefits due or to become due under any law administered by the Secretary shall not be

> assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall e exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

In the instant case the Florida Circuit Court, in recognition of *Mansell*, very specifically clarified that it was not ordering that Mr. Padot to utilize any portion of his disability benefits to comply with the effect of the property distribution and award of retirement benefits to Mrs. Padot. Even if Mr. Padot had been required to use his disability benefits to satisfy his obligation, given the intent of the anti-attachment provision, there would be no "major damage" to "clear and substantial federal interests." *Hisquierdo, supra*, 439 U.S. at 581.

In *Rose v. Rose*, 481 U.S. 619 (1989) this Court considered this anti-attachment provision in the context of a child support enforcement action. The Court noted that the legislative history was sparse but recognized that it served two purposes: "to 'avoid the possibility of the Veterans' Administration . . . being placed in the position of a collection agency' and to 'prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income.' citing S. Rep. No. 94-1242, pp. 147 - 148(1976), U.S. Code Cong. & Admin.News 1976, pp. 5241, 5369, 5370). *Rose, supra*, at 631. It further noted that disability benefits ". . . are intended to 'provide reasonable and adequate compensation for disabled veterans *and their families*." (Emphasis in the original).

citing S.Rep. No. 98 - 604, p. 24 (1984), U.S.Code Cong. & Admin. News 1984, pp. 4479, 4488. As Justice O'Connor, with whom Justice Stevens joined in the concurring opinion wrote, "The plain intent of § 3101(a) is to protect the veteran *and* his family against the claims of creditors. It is not intended to protect the veteran against claims *by* his family." (Emphasis in the original).

There is nothing in the plain language of the anti-attachment provision which authorizes a veteran to utilize it as a means of depriving a former non-military spouse of his or her property interest which, but for the unilateral action of the veteran, would be secure.

The Florida state court acted within its established authority in the instant case and in no way contravened federal law. As recognized by the Florida Appellate Court, the Supplemental Order awarded Mrs. Padot a vested interest in Mr. Padot's military retirement benefits and provided that neither party was to take any action which would deprive the other of the [military benefits.] It further reserved jurisdiction to enforce Mrs. Padot's rights to her share of the benefits.

Contrary to the Petitioner's assertion, the Florida Circuit Court's enforcement of the divorce decree is not dependent on the inclusion of an indemnification provision. The Supplemental Order of 1995 clearly directed Mr. Padot to not take any action which would deprive Mrs. Padot of her interest in the military retirement benefits. This Order was never appealed by Mr. Padot and became a final order subject to the Florida state courts' inherent enforcement authority. The Florida Appellate Court determined that the Circuit Court properly exercised its enforcement authority, citing as support the cases of *Janovic v. Janovic*, 814 So.2d 1096, 1101 (Fla. 1st DCA

2002), and *Johnson v Johnson*, 37 S.W. 3d 892 (Tenn. 2001). The facts of *Janovic* are similar to those of the instant case. Mr. Janovic was still in the military when the parties divorced. Less than a year later he retired and waived a portion of his retirement pay to receive disability benefits. The appellate court held that the order requiring Mr. Janovic to indemnify his former wife for the reduction of her benefits did not violate *Mansell*. The court held that the lack of an indemnification provision in the parties' agreement was not fatal. *Janovic, supra, at 1101.*

Similar logic was applied in *Black v. Black*, 842 So.2d 1280 (Me. 2004). The parties' marital settlement agreement, which divided the husband's military retirement benefits, did not contain a "savings" or indemnification clause. The Court held that, " Enforcement relief is not, however, dependent on the existence of a savings clause or a covenant of good faith and fair dealing where, as here, a party's post judgment actions render the divorce judgment's distributive award a nullity." Id. at 1285. The Court further held that "The strong public policy favoring the finality of property distributions and nonmodifiable waivers of spousal support is not furthered here by the denial of enforcement. David's election of disability pay in lieu of retirement pay usurped the allocation of property ordered in the judgment, and it promoted the exact instability of requiring David to pay directly to Lorraine the amounts she would have received but for his action." Id. at 1286.

There is no specific directive or requirement in the USPSPA or *Mansell* which precludes state courts, such as the Florida state court in the instant case, from enforcing their own divorce decrees, when a retired military spouse unilaterally converts retirement benefits to disability benefits, post-judgment, thereby depriving a non-military spouse her vested

property interest in the retirement benefits. To allow a military spouse to convert the benefits, post-judgment, without requiring that the non-military spouse be made whole either with assets or other income of the military spouse, would render every military divorce unstable and a potential nullity.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JANE HARLEY GROSSMAN
Counsel of Record
132 24th Avenue North
St. Petersburg, Florida 33704
Phone (727) 823-7600
Counsel for Respondent